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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 803

WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION, AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION,

Petitioners,

vs.

E. E. BRUNER,

Respondent.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Petition for Writ of Certiorari Complies with the Rules of the Supreme Court of the United States.

Paragraph 2 of Rule 38 reads: "The petition should contain a summary and short statement of the matter involved;—."

The summary and short statement of the matter involved set forth on pages 1 and 2 of the petition disclose the general nature of the case. The details of the case are set forth in the statement of the case in the brief which supports the summary and short statement.

Respondent's Contention that the Entire Charge to the Jury Should have been Included in the Record is Inconsistent with Respondent's Action in Regard to Petitioners' Praecipe for Record.

Respondent on pages 2 and 3 of his brief asserts that the entire charge of the court should have been set forth in the record. Petitioner followed the practice required by Rule 38, paragraph 8, of this Court, which admonishes counsel to stipulate to omit from the printed record all matters not essential to a consideration of the questions presented by the petitioner for the writ.

The Praecipe for Record (R. 118-122) requested in Items 6, 7, 8, 9, 10 and 11 (R. 119) that there be included in the certified record instructions to the jury Nos. 6, 9 and 20 and the exceptions thereto. This praecipe, together with copy of the petition for the writ of certiorari, was served on counsel for respondent on February 21, 1944. (R. 122.) At the suggestion of respondent, petitioners included in the praecipe Items Nos. 21, 22 and a statement regarding the record on appeal from the trial court to the Supreme Court of Utah. (R. 121, 122.) That these items were included at the request of respondent affirmatively appears in the praecipe itself, which reads: "At the suggestion of the respondent, appellants further request you to transcribe and certify the following portions of the record:—" (R. 121.) Then follows the request for Items 21, 22 and said statement.

In the praecipe as served upon counsel for respondent also appeared the following statement: "Said portions of the record are all of the material portions thereof necessary to a proper presentation and consideration in the Supreme Court of the United States of the questions presented by the Petition for Certiorari." (R. 122.)

It is submitted that the procedure followed constitutes a stipulation by the parties hereto that the portions of the record specified in the praecipe, together with those added by respondent, constituted all of the material portions of the record necessary to a proper presentation and consideration of the questions presented by the petition for certiorari.

Respondent's Brief Misconstrues Petitioner's Contention.

On page 3 respondent makes the misstatement that on page 8 of the brief of petitioners it is said "that the issue of negligence was not submitted to the jury—." No such statement is made on page 8 of petitioners' brief or elsewhere. The statement is made that the Supreme Court of Utah held as matter of law that the evidence introduced at the trial would have jusified the trial court in wihholding the issues of negligence and contributory negligence from the jury.

Petitioners have never contended that the trial court did not submit the issues of negligence or contributory negligence to the jury. Petitioners' contention has been that they were erroneously submitted. The Supreme Court disposed of those contentions by holding as matter of law that the railroad was negligent and that the employe was not guilty of contributory negligence. It is of those holdings that petitioners here complain and it is those holdings as to which petitioners seek certiorari.

That the Supreme Court did so hold is obvious from its opinion. Respondent on page 9 thus states the holding of the Supreme Court—"the Supreme Court of Utah determined that, as matter of law, the petitioners were liable and that respondent was free from contributory negligence, and hence assigned errors in regard to safety rules and instructions on contributory negligence could not have been prejudicial to the petitioners."

On page 4 respondent refers to the record as incomplete and jumbled and in other places on pages 3 to 7 urges that the record is incomplete with respect to the charge to the jury. It does not lie in respondent's mouth to complain of the record in view of the procedure described above.

Reply as to Respondent's Contention that he was not Guilty of Contributory Negligence as Matter of Law.

Respondent's brief discloses a misconception as to the nature of petitioners' contention. Petitioners do not contend that the evidence requires the conclusion that respondent was guilty of contributory negligence as matter of law but merely that the evidence required submission to the jury as to whether the respondent was guilty of contributory negligence. This misconception of respondent is evidenced by statements on page 12 of his brief and also by his reliance on the case of *Mathews* v. *Daly West Mining Co.* cited on page 13 of his brief. That case merely holds that the motions for non-suit and directed verdict made by the defendant were properly denied. It does not hold as matter of law that plaintiff was not guilty of contributory negligence.

Reply as to Respondent's Contention that Petitioners were Guilty of Negligence as Matter of Law.

Respondent makes the contention at the bottom of page 19 that this question is moot because respondent did not plead that Colosimo was negligent in failing to anticipate that respondent might disobey Colosimo's order. On the contrary the complaint affirmatively alleges that Colosimo was negligent in moving the engine without warning. (R. 3.)

It is asserted on page 20 that the record does not disclose that any such order was given by Colosimo. The evidence is set forth on pages 15 and 16 of petitioners' brief with references to the record where the evidence may be found.

It is also asserted on page 20 by respondent that the failure of Colosimo to anticipate the breach by Bruner of Colosimo's order did not in whole or in part cause the injuries sustained by respondent. It is the contention of petitioners that this cannot be said as matter of law.

Conclusion.

Petitioners pray that this Honorable Court grant their petition for writ of certiorari.

Respectfully submitted,

P. T. FARNSWORTH, JR.,
W. Q. VAN COTT,
Counsel for Petitioners.